

EXPORT LICENSING: UNCOORDINATED TRADE REPRESSION

I. INTRODUCTION

The recent history of United States export regulation can be divided into two major segments—the period of administration under the Export Control Act¹ of 1949, and the period under its successor, the Export Administration Act² enacted in 1969. The Export Control Act (ECA) was a major step toward compensation regulation of exports after the stringent controls adopted in response to specific problems following World War II.³ The enactment of the Export Administration Act (EAA) in 1969 marked a loosening of trade controls over its predecessor, the ECA. The Export Administration Act is scheduled to expire in September of 1979.⁴ Criticism of the EAA in view of contemporary trade conditions suggests that we may be on the threshold of a third major segment in export regulation. An opportunity exists for a fundamental reassessment of United States export policy to balance the interests of American business and government.

This Note will examine export licensing with primary analysis being given to the existing licensing mechanisms of the Export Administration Act. The Note has four major sections: (1) an explanation of the relationship of world political and military events to United States export policy; (2) a review of the procedures for export licensing under the EAA; (3) a discussion of the impediments to exportation posed by the present licensing scheme and suggestions for improvements in light of existing political and trade conditions; and (4) consideration of procedural reforms needed to protect the interests of exporters applying for export licenses.

II. RECENT HISTORY OF UNITED STATES EXPORT CONTROL POLICY

The development of United States export control regulations following World War II has been primarily in response to the expansion of the political and military influence of the Soviet Union.

¹ 50 U.S.C. app. §§ 1-44 (1968).

² 50 U.S.C.A. app. §§ 2401-13 (Cum. Supp. 1978).

³ See Berman & Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791 (1967).

⁴ 50 U.S.C. app. § 2413.

However, besides reflecting the evolving relationship between the United States and communist countries, export regulations have been influenced by the declining post-war role of the United States as a key source of strategic commodities and military hardware.⁵

United States concern with protection of national security against communist advances became focused in 1948 with the communist coup in Czechoslovakia and the Berlin Blockade.⁶ In 1949 the Export Control Act was enacted as a temporary measure responding to the mounting "Cold War" between the United States and the Soviet Union.⁷ The ECA was the first comprehensive scheme for the regulation of exports during peacetime.⁸ The objectives of the licensing restrictions of the ECA were to prevent depletion of items in short supply and to insure that the Soviet Union and other communist countries did not receive goods with military or strategic significance. Prior to the ECA in 1949, export controls were imposed only in response to war or specific emergency situations.⁹ The ECA was renewed in 1951 with the United States entry into the Korean War.¹⁰

Another development in 1951 was the enactment of the Mutual Defense Assistance Control Act¹¹ (the Battle Act), which attempted to impose broad restraints on military and strategic exports from the free world to communist countries. It did so by providing for the denial of military, economic and financial assistance from the United States to countries which permitted the sale of items controlled by Battle Act lists to embargoed destinations.¹² Specific

⁵ See Berman and Garson, note 3 *supra*.

⁶ *Id.* at 795-96.

⁷ H.R. REP. NO. 524, 91st Cong., 1st Sess. (1969) [statement of Congressman Ashley], reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2707.

⁸ Berman & Garson, *supra* note 3, at 794. Legislation enacted prior to the ECA, the Trading with the Enemy Act of 1917, 50 U.S.C. app. 1 et seq. (1970), authorizes the President to prohibit all private financial and commercial dealings with United States enemies and their allies during time of war or any period of national emergency. In recent times these provisions have been applied to trade with North Korea, North Vietnam and the People's Republic of China (the Act no longer applies to China). Section 5(b) of the Act provided the interim basis for continuation of export controls upon lapse of the EAA in 1971 and again in 1976, see Executive Order No. 11940.

⁹ Berman & Garson, *supra* note 3, at 793.

¹⁰ The Export Control Act was subsequently renewed in 1956, 1958, 1960, and 1962. *Id.* at 799.

¹¹ 22 U.S.C. §§ 1611 et seq. (1970). The Mutual Defense Assistance Control Act permits the United States government to embargo shipments of arms, ammunition, implements of war, nuclear materials, petroleum and other strategic items to nations where export of such items would threaten the security of the U.S.

¹² *Id.* § 1612b.

licensing controls on the export of arms, ammunition and other implements of war were provided for in 1954 by the Mutual Security Act.¹³

International cooperation for the control of commodities with strategic significance was undertaken simultaneously with the passage of the ECA in 1949. Representatives of seven free world countries¹⁴ compiled embargo lists of strategic goods, and, in 1950 a representative body known as the Coordinating Committee, or COCOM, was established to review and develop these lists.¹⁵ Because COCOM was not formed through a multilateral treaty individual member governments remain responsible for domestic legislation to effectuate the agreed upon international controls.

The Export Control Act was administered by the Department of Commerce. The Battle Act and the Mutual Security Act were, and continue to be, administered by the Department of State. Other regulations relating to exporting fall within the jurisdiction of the Treasury Department.¹⁶ It is apparent that during the 1950's export regulations were a response to strongly perceived security dangers posed by the emerging Sino-Soviet communist bloc. During the 1950's, the urgency of effective action to counter this threat presented few challenges to multi-agency coordination in administering export regulations.

While the United States embargo against communist countries

¹³ *Id.* § 1934 (1970). See 15 C.F.R. § 370, Supp. II (1978), for the current U.S. munitions list. The International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 121 et seq., were issued in 1972 pursuant to the Mutual Security Act. ITAR implements the President's authority to control the import and export of arms, ammunition, and other implements of war, including technical information concerning these items. See also the Arms Export Control Act, 22 U.S.C. § 2751 (recommending no increase in authorized volume of sales of defense articles) and § 2778 (granting authority to the President to define which items are "defense articles" subject to licensing under 22 U.S.C. § 2751; see, 22 U.S.C. 2794, for definitions).

¹⁴ The countries initially involved in this cooperative effort were the United States, the United Kingdom, France, Italy, the Netherlands, Belgium, and Luxembourg. Berman & Garson, *supra* note 3, at 834-35.

¹⁵ *Id.* COCOM presently includes all NATO countries with the exception of Iceland, plus Japan. See H.R. REP. NO. 524 note 7 *supra*, at 2708. Section 2(2) of the Export Control Act states:

it is the policy of the United States to formulate, reformulate and apply such controls to the maximum extent possible in cooperation with all nations with which the United States has defense treaty commitments, and to formulate a unified commercial and trading policy to be observed by the non-communist dominated nations or areas in their dealings with the communist dominated nations.

50 F.C.A. app. § 2022 (1966).

¹⁶ The Treasury is responsible for administering the Foreign Assets Control Regulations, 31 C.F.R. 500.101, et seq., and the Transaction Control Regulations, 31 C.F.R. 500.01 et seq., under the Trading with the Enemy Act of 1917, 50 U.S.C. app. 1 et seq.

was moderately effective immediately following World War II, three factors led to a reassessment of export policy during the decade following 1960. First, the role of the United States as the primary supplier of industrial and strategic goods had declined. Second, cooperation among COCOM allies in voluntarily adhering to the COCOM list had also declined.¹⁷ Third, despite efforts to inhibit communist military development it had become clear that the Soviet Union had developed potent military-industrial capability.¹⁸ Although popular sentiment was that "... it would be immoral for an American for the sake of profit to sell bullets abroad that are going to be used against American boys in Vietnam or elsewhere,"¹⁹ it was clear the United States embargo would not cause communist military forces to suffer a scarcity of ammunition.²⁰ In light of changed circumstances, pressure began to mount, especially from the American business community, for a liberalization of export restrictions.

The Export Control Act was scheduled to expire in 1969. During the twenty year period between 1949 and 1969 the premises underlying United States export policy had changed considerably, raising the necessity for a reassessment of existing legislation. Several amendments to the Export Control Act were proposed,²¹ but Congress responded with new legislation—the Export Administration Act.²²

The new act did not abolish the export controls of the old ECA. It was intended, however, to liberalize export restrictions to the degree necessary to conform United States export policy to the world trade situation produced by the dramatic changes which had taken place over the past twenty years.²³ It was believed that

¹⁷ Note, 12 VA. J. INT'L L. 102 (1971).

¹⁸ H.R. REP. NO. 524, *supra* note 7, at 2708. Some take the view that the embargos imposed had a counterproductive effect.

West European observers have seen embargo as playing into the hands of Stalin. It enabled him to consolidate control in the Communist bloc and forced the small East European countries closer to the Soviet Union. On balance, these observers have seen embargo as resulting in the strengthening of the military-industrial sector of the Communist bloc and therefore under the circumstances it was welcome and advantages to the Kremlin.

Id.

¹⁹ *Hearings on H.R. 4239 Before the Subcomm. on Int'l Trade of the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 7 (statement of Congressman Ashley).

²⁰ Note *supra* note 17, at 103.

²¹ See generally *id.* at 104-10.

²² 50 U.S.C. app. §§ 2401 et seq. (Cum. Supp. 1978).

²³ McQuade, *U.S. Trade With Eastern Europe: Its Prospects and Parameters*, 3 L. & POLY INT'L BUS. 43 (1971). McQuade notes four developments of previous decades which required adjustment: (1) the economic recovery of Western Europe and strengthened West European security in relation to the Communist Countries; (2) growth in the economic

partial relaxation of restrictions under the new EAA would not present a serious threat to the national security of the United States in view of specific restraints which could be imposed under the Mutual Security Act, the Trading with the Enemy Act and the Battle Act.²⁴

The EAA was an attempt to balance remnants of Cold War fears of Soviet military aggression with mounting pressure toward more open East-West trade. An examination of the mechanics of the EAA, as well as the administrative procedures implementing the export licensing system, will help shed light on how the EAA has balanced these interests.

III. THE EXPORT ADMINISTRATION ACT OF 1969

A. *Congressional Policy and Framework for Administration of the Act*

In the first section of the EAA²⁵ the Congress states five findings which clearly set out the need to balance security and foreign policy interests on one hand with free trade on the other. The first finding states that the quantity and composition of products available at home and overseas "may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States."²⁶ Building upon this finding, the Congress states that, second, the national security of the United States may be adversely affected if certain materials which could make a significant contribution to the military potential of other nations are exported without restrictions.²⁷ The final three findings weigh in favor of a loosening of trade controls. The third finding notes that unwarranted restriction of certain exports may adversely affect the balance of payments situation, especially when restraints "are more extensive than export restrictions imposed by countries with which the United States has defense treaty commitments."²⁸ The fourth find-

strength of Eastern Europe and its confidence in its security vis-a-vis the West; (3) a shattering of the appearance and reality of world unity among the Communist countries; and (4) a decline in the rigid ideological assumptions held by the East and the West concerning each other, coupled with the corresponding adjustments of conduct (though not always rhetoric).

²⁴ See notes 8, 11, 13 *supra*.

²⁵ 50 U.S.C. app. § 2401 (Cum. Supp. 1978).

²⁶ *Id.* § 2401(1).

²⁷ *Id.* § 2401(2).

²⁸ *Id.* § 2401(3).

ing recognizes that "uncertainty of policy" has curtailed business efforts and impaired the United States balance of payments situation.²⁹ In the fifth finding it is noted that unreasonable restrictions on access to supplies can cause political instability and retard the development of nations.³⁰

These findings establish that regulation under the EAA should balance a number of interests. The first two findings set out the preeminent concern of the Congress for the advancement of the foreign policy and national security interests of the United States. The following findings, although more sensitive to the positive effects of free trade on domestic and foreign policy, are qualified to remain subordinate to security concerns.

The difficulty in applying this and other balancing schemes arises from the procedures and operational guidelines governing the determination of the instances in which restraints will promote Congressional policy. The Congressional policy of the EAA is to encourage trade except where it is determined by the President that a transaction would be against national interests, and to restrict exports which would prove detrimental to national security.³¹ It could be inferred from this that Congress intended to assure free trade except where reasonable grounds exist for believing that a transaction would injure foreign policy or security interests. However, it should be noted that the President is granted broad discretion to make such determinations without obligation to explain his conclusions to the exporter.³² Although the initial motivation of Congress to enact the EAA was to facilitate more liberal export trade, this objective is diluted by an expansive deference to Presidential discretion.³³

B. *Delegation of Authority to the Executive*

1. *Development of the EAA*

The section of the EAA concerning authority to implement ex-

²⁹ *Id.* § 2401(4).

³⁰ *Id.* § 2401(5).

³¹ *Id.* § 2402(1)(B).

³² *See, e.g.,* note 51 *supra* and accompanying text.

³³ *Id.* *See also* McQuade, note 23 *supra*, at 85-86. In comparing the language of the Export Control Act of 1949 with the Export Administration Act of 1969, McQuade interprets some policy statements as adding a flavor of trade promotion rather than trade repression, citing several examples at footnote 178. However, McQuade notes that the House of Representatives prevailed in their orientation to the legislation as primarily for regulation and control, and not for purposes of trade expansion.

port policy³⁴ was one of the most heavily debated sections during the 1969 Congressional hearings. As enacted, it remains one of the most often criticized areas of the EAA. The first sub-section, describing the duties of the Secretary of Commerce, has not generated much discussion.³⁵ Rather it has been the following sub-section,³⁶ concerning the discretionary power of the President over export policy, which has been a center of controversy.³⁷ An examination of the Congressional debate on this provision will explain the conflicting views.

In general, the House of Representatives and the Nixon Administration favored extension of the Export Control Act, without modification, for four more years, taking the position that trade could be liberalized under the existing legislation.³⁸ The Export Control Act of 1949 vested authority in the President to control export policy. House Bill 4293³⁹ reflects the views of the Administration by preserving full Presidential authority to control exports for reasons of national security, foreign policy, and short supply.⁴⁰

The Senate took a different position in Senate Bill 1940,⁴¹ introduced for the purpose of encouraging trade promotion. S. 1940 placed a number of restrictions on the export control authority of the President. Section 4(b) of the proposed S. 1940 required exporters to obtain express permission⁴² to export an article only when the President had determined that an item would be capable of a significant military application which would impair the national security and welfare of the United States. Section 4(c) stated two criteria for determining when an item would require express permission: (1) when the item would likely be used for military purposes, and (2) when similar goods or technology are not readily available to the importing country from other sources. Moreover, it was explicitly provided that such per-

³⁴ 50 U.S.C. app. § 2403 (Cum. Supp. 1978).

³⁵ *Id.* § 2403(a)(1). This section obliges the Secretary of Commerce to take organizational and procedural steps to implement the EAA, to periodically review the Commodity Control List, to report concerning actions taken, and to inform the business community of changes in export policy and procedures.

³⁶ *Id.* § 2403(b)(1).

³⁷ See Berman & Garson, note 3 *supra*, at 792.

³⁸ McQuade, *supra* note 23, at 84.

³⁹ H.R. 4293, 91st Cong., 1st Sess. (1969).

⁴⁰ H.R. REP. NO. 681, 91st Cong., 1st Sess. 8 (1969) (statement of Managers on the Part of the House-Full Presidential Regulatory Authority Preserved).

⁴¹ S. 1940, 91st Cong., 1st Sess. (1969) [hereinafter S. 1940].

⁴² This requirement of obtaining express permission means that the exporter would have to procure a "validated license." See text in Section B. 2 of this Note *infra*.

mission would not be denied unless there was substantial evidence that these criteria had been met.⁴³ This proposal would have prohibited the President from denying applications indiscriminately while continuing to provide protection for United States national security.

The final version of this section of the EAA preserved the broad discretionary authority of the President in administering export controls, rejecting the Senate proposals. A damaging blow was dealt to proponents of free trade by the new legislation on this point.⁴⁴

2. 1977 Amendments

In 1977, Congress re-evaluated its position on the issue of Presidential discretion and amended the EAA to include language qualifying the President's discretionary authority.⁴⁵ The EAA now requires that a number of factors affecting export policy be taken into account in license determinations in addition to the status of a destination country as communist or non-communist.⁴⁶ The EAA states three factors which should be considered in determining export policy: (1) a country's present and potential relationship to the United States, (2) its present and potential relationship to countries friendly or hostile to the United States, and (3) its ability and willingness to control retransfers of United States exports in accordance with United States policy.⁴⁷

Another fundamental change made by the 1977 amendments requires that the export by American sellers of goods freely available outside the United States may be restricted only in cases where the President has reason to believe that the absence

⁴³ See also S. 2696, 91st Cong., 1st Sess. (1969). This was another proposal for reform of Presidential export control authority which was less restrictive than S. 1940. It provided that notwithstanding Presidential inability to make a determination of whether an item would be used for military purposes and that it was not available from other sources, the President retained authority to restrict exports on national security grounds provided he gave the Congress a detailed explanation of his action.

⁴⁴ Berman & Garson, *supra* note 3, at 792.

Probably no single piece of legislation gives more power to the President to control American Commerce. Subject only to the vaguest standards of 'foreign policy' and 'national security and welfare,' he has authority to cut off the entire export trade of the United States, or any part of it, or to deny 'export privileges' to any or all persons.

Id.

⁴⁵ Export Administration Amendments of 1977, Pub. L. No. 95-52, § 103, 91 Stat. 235 (amending 50 U.S.C. app. § 2403(b)(2)(A) and (B)).

⁴⁶ 50 U.S.C. app. § 2403(b)(2)(A).

⁴⁷ *Id.*

of controls would be detrimental to the security of the United States.⁴⁸ Although the legislative history of the amendment suggests that this change was intended to reverse the presumption against the imposition of validated license controls,⁴⁹ the enactment requires the exporter to establish the availability "without restriction from sources outside the United States [of items] in significant quantities and comparable in quality of those produced in the United States"⁵⁰ Even where this is established, controls may be imposed for overriding reasons of national security which are required to be disclosed only through annual reports by the President to Congress.⁵¹

In addition to delegating authority to the President to control export policy, the EAA provides that "[t]he President may delegate the power, authority, and discretion conferred upon him by this Act to such department, agencies, or officials of the Government as he may deem appropriate."⁵² Therefore, not only does the EAA delegate authority to the President, but the Act also permits the President to disperse operational accountability for export policy among various executive agencies. Presently there are several agencies involved in the administration of export licensing, each of which represents a specific governmental interest or expertise with respect to particular exports.⁵³ A survey of the licensing process will suggest the advantages and disadvantages of multi-agency participation.

C. *Structure of Export Licensing under the EAA*

1. *The Office of Export Administration*

The Secretary of Commerce, to whom has been delegated the responsibility of implementing the policy of the EAA,⁵⁴ has centralized the management and administration of this responsibility in the Office of Export Administration (OEA).⁵⁵

The EAA obligates the OEA to consult with other executive agencies in the development of policies and operations having

⁴⁸ *Id.* § 2403(b)(2)(B).

⁴⁹ H.R. REP. NO. 190, 95th Cong., 2d Sess. 8-9 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 362, 369. [hereinafter H.R. REP. NO. 190].

⁵⁰ 50 U.S.C. app. § 2403(b)(2)(B) (Cum. Supp. 1978).

⁵¹ *Id.*

⁵² *Id.* § 2403(e).

⁵³ See text accompanying note 57, *infra*.

⁵⁴ 50 U.S.C. app. § 2403(a)(1) (Cum. Supp. 1978).

⁵⁵ See Exec. Order No. 12,002, 42 Fed. Reg. 35623 (1977).

substantial bearing on exports.⁵⁶ Thus, the export licensing community consists not only of the Department of Commerce but also a group of consulting departments and agencies. The Comptroller General has described this community as follows:

[t]he principal consultants are the Departments of Defense, Energy, State and to a lesser extent the National Aeronautics and Space Administration. The Central Intelligence Agency serves as an intelligence advisor to the licensing community and does not normally make formal recommendations on license applications. Any other agency that has special technical knowledge considered pertinent to a particular export license application . . . also gives technical advice when asked to do so.⁵⁷

With exceptions to be noted in Part D., below, the bulk of license applications are determined by the OEA. The Congressional requirement that the OEA consult with other departments⁵⁸ is employed only in cases where there is a possible intragovernmental controversy over whether exportation of a particular item should be permitted.⁵⁹ In the event of disagreement among participating agencies, an interagency review hierarchy is implemented.

2. *Export Licenses*

All exports from the United States require government authorization. However, because of the great volume of commodities exported from the United States it would be expensive and inefficient to require all license applications to be subjected to OEA scrutiny.⁶⁰ Therefore the Export Administration Regulations,⁶¹ promulgated by the OEA, provide for two basic types of licenses: general⁶² and validated.⁶³

⁵⁶ 50 U.S.C. app. § 2402(a) (Cum. Supp. 1978).

⁵⁷ COMPTROLLER GENERAL REPORT TO CONGRESS, THE ADMINISTRATION OF UNITED STATES EXPORTS SHOULD BE CONSOLIDATED TO BE MORE RESPONSIVE TO INDUSTRY 3 (Oct. 31, 1978) [hereinafter 1978 COMPTROLLER GENERAL REPORT].

⁵⁸ See note 56 *supra*.

⁵⁹ McIntyre, Survey of the Licensing Process under the Export Administration Act 32 (1978) (unpublished paper on file at the Dean Rusk Center for International and Comparative Law, Athens, Georgia).

⁶⁰ A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 156 (W. Survey & C. Shaw eds., 2d ed, 1977).

⁶¹ 15 C.F.R. §§ 368-399 (1978).

⁶² *Id.* § 371 (1978).

⁶³ *Id.* § 372 (1978).

The regulations specifically grant authority to export certain commodities and technical data to designated country groups.⁶⁴ Items which are among those listed may be exported without formal approval by the Department of Commerce under what is termed a general license. Although no formal application is required, an exporter shipping under a general license must file a Shipper's Export Declaration.⁶⁵

If shipment of particular goods is not permitted under these regulations, i.e., if a general license is unavailable, or if the goods are restricted by the Commodity Control List (discussed in the next section), then the exporter must apply for a validated license.⁶⁶ A validated license is a formal authorization permitting the exporter to ship a specified commodity to a named consignee in a particular country for a designated use.⁶⁷ There are various types of validated licenses which can be applied for;⁶⁸ however, the purpose of the application in every case is to require the exporter "to make the fullest disclosure of all parties and interests to the transaction."⁶⁹

Compliance with the licensing procedure and issuance of a license does not guarantee that a shipment will thereafter be beyond regulation. The government reserves the right to revise, suspend or revoke all licenses without notice.⁷⁰ If a shipment is already enroute, the government may recall the items and order them unloaded.⁷¹

3. *Regulated Commodities*

The Commodity Control List (CCL),⁷² issued by the OEA, prescribes those items which cannot be exported without the is-

⁶⁴ *Id.* § 370, Supp. I (1978). In this section the countries falling within each country group are listed. See generally 15 C.F.R. § 371, for an explanation of which products can be exported to which countries under a general license.

⁶⁵ *Id.* § 371.2(a). This document describes the commodity being exported and provides the names and addresses of the exporter and the receiving party. See also 50 U.S.C. app. § 2405, dealing with violations and penalties.

⁶⁶ *Id.* § 370.3(a).

⁶⁷ *Id.* § 372.2(a). See also § 379.5 for special technical data provisions.

⁶⁸ *Id.* § 372.2(b). See also § 373 which specifies the licensing procedures applicable to validated licenses other than those obtained for an individual transaction. The purpose of these special procedures is to facilitate exportation in cases of extended or reoccurring transactions by allowing the exporter to obtain a license covering a series of related transactions.

⁶⁹ *Id.* § 372.3(a). See also § 372.6(b) for a detailed explanation of the information the applicant is required to provide.

⁷⁰ *Id.* § 370.3(b).

⁷¹ *Id.*

⁷² *Id.* § 399.1.

suance of a validated license. A commodity is placed on the CCL when the Department of Commerce, usually in conjunction with advice received from other departments, determines that it is necessary to evaluate such commodity export applications on a case-by-case basis.

The current CCL, as published in the Export Administration Regulations, is incorporated by reference into the Code of Federal Regulations.⁷³ Modifications of the CCL are made informally because administration of the EAA is exempt from the Administrative Procedure Act.⁷⁴ The Department of Commerce is not required to publish modifications of the CCL which may be under consideration, or to provide for general public comment. Changes in the CCL are disclosed in the Export Administration Bulletin.⁷⁵

The exporting community is given an opportunity to express its views concerning the contents of the CCL through the Technical Advisory Committees, which are established by the Department of Commerce upon request from producers of items subject to export controls.⁷⁶ Each committee is composed of representatives from government and industry.⁷⁷ The EAA requires that "[m]embers of the public shall be give a reasonable opportunity, pursuant to the regulations . . . , to present evidence to such committees."⁷⁸ However, the regulations permit participation to be limited to written statements and allow meetings to be declared "closed," thereby substantially limiting public input.⁷⁹ As of March 1, 1979, there were six Technical Advisory Committees.⁸⁰ In view of the numerous exporting interests in the United States, the low number of active committees suggests that this avenue of industry participation has not been attractive to private exporters.

⁷³ *Id.*

⁷⁴ 50 U.S.C. app. § 2407 (Cum. Supp. 1978).

⁷⁵ 15 C.F.R. § 399.1(c) (1978). See § 399.2(c) which states that the Commodity Interpretations will also be published in the Export Administration Regulations and revisions will appear in the Export Administration Bulletin.

⁷⁶ 50 U.S.C. app. § 2404(c) (Cum. Supp. 1978); 15 C.F.R. § 390.1 (1978).

⁷⁷ 50 U.S.C. app. § 2404(c)(1).

⁷⁸ *Id.* § 2404(c)(2).

⁷⁹ See 15 C.F.R. § 390.1(f) (1978), providing that members of the public may freely submit written statements. However, in order to deliver an oral statement a request must be made in advance and will be granted only if time permits. Additionally, public input at any particular meeting may be prohibited if a determination is made that the meeting should be "closed." If the meeting is "open," members of the public may attend, but generally they may not participate or ask questions.

⁸⁰ COMPTROLLER GENERAL REPORT TO CONGRESS, EXPORT CONTROLS: NEED TO CLARIFY POLICY AND SIMPLIFY ADMINISTRATION 20 (Mar. 1, 1979) [hereinafter COMPTROLLER GENERAL].

4. *Multilateral Controls: The COCOM Embargo Lists*

The main purpose of COCOM⁸¹ "is to achieve parallel administration of export controls"⁸² among member nations. However, COCOM is not the product of a formal treaty and the embargo list which it promulgates is enforced only by voluntary implementation through national legislation.⁸³

Initially, COCOM adopted policies which were in accord with United States views concerning which commodities should be controlled for strategic reasons. A major reason for the leadership of United States policy in this area at one time was because those countries which comprise COCOM are subject to the aid termination provisions of the Battle Act.⁸⁴ With the continuing economic recovery of these countries of World War II receded into the past, the aid limitations of the Battle Act declined as an effective bargaining tool, and United States influence in COCOM decision-making eroded.⁸⁵

The United States continues to play a major role in COCOM, and it has been asserted that the United States continues to envision itself as "the conscience of COCOM."⁸⁶ However, other COCOM countries consider the export policy of the United States to be overly restrictive and anticompetitive.⁸⁷ This results in different ideas on which items should be controlled as well as differences in interpretation concerning the application of those export controls which have been agreed upon.

5. *Relationship Between the Commodity Control List and the COCOM List*

The items listed on the Commodity Control List (CCL) and the COCOM list (COCOM) have never been closely coordinated.⁸⁸ Ac-

⁸¹ See discussion of COCOM at text accompanying note 15 *supra*.

⁸² President's Report to Congress on Multilateral Export Controls, July 10, 1978, reprinted in U.S. EXPORT WEEKLY, July 18, 1978 at N-1.

⁸³ DEPARTMENT OF STATE, THE BATTLE ACT REPORT 1973 1 (26th Report to Congress 1974); Dept. of State Publ. 8765.

⁸⁴ See discussion of Battle Act at text accompanying notes 11 and 12 *supra*.

⁸⁵ COMPTROLLER GENERAL, *supra* note 80, at 8. As early as 1957 it was evident that United States ability to influence COCOM policy through the Battle Act was dissipating. During that year a COCOM country violated the COCOM embargo and the other COCOM members concurred, notwithstanding the fact that the United States was providing significant levels of aid to a number of members. *Id.*

⁸⁶ *Id.* at 9.

⁸⁷ *Export Licensing of Advanced Technology: A Review: Hearings Before the Subcomm. on Int'l Trade & Commerce of the House Comm. on Int'l Rel.*, 94th Cong., 2d Sess. 35 (1976) [hereinafter *Export Licensing*].

⁸⁸ H.R. REP. NO. 524 *supra* note 7, at 2707-08.

cording to the General Accounting Office the United States controls the export of 143 categories of industrial items; 105 in common with the other COCOM members and 38 on a unilateral basis.⁸⁹ These unilateral restrictions by the United States continue even though the Congress, in 1977 revisions to the EAA, indicated its clear policy against denial of export authorization when an item is freely available on foreign markets.⁹⁰

This disparity has been criticized on two major grounds. First, the objective of developing a COCOM list was to reflect a consensus by members on which strategic items required export controls. Second, it is unreasonable for the United States to restrict items in addition to those on the COCOM list because those items can be sold by businesses in other COCOM countries.⁹¹ Representatives of American business interests have suggested that the United States should limit the requirement of a validated license to those items requiring COCOM approval,⁹² and elevate the COCOM agreement to treaty status to compel all COCOM members to enforce the list in the same manner as the United States.⁹³

The COCOM list is revised every two to three years, providing the United States with periodic opportunities to review the CCL as well. By doing so, the CCL could be conformed to the views of our COCOM allies. Unfortunately, the United States has not taken advantage of these opportunities, and continues to maintain the existing dual control system.⁹⁴

In the situation where the OEA tentatively approves a validated license for an item included on the COCOM list, the Office of East-West Trade of the Department of State is required to request an exception from COCOM. If approved, this petition will "exempt an item on a one time basis from international con-

⁸⁹ COMPTROLLER GENERAL, *supra* note 80, at 18.

⁹⁰ 50 U.S.C. app. § 2403b(2)(B) (Cum. Supp. 1978).

⁹¹ Hoya, *Changing U.S. Regulation of East-West Trade*, 12 COLUM. J. TRANSNAT'L L. 1, 11 (1973). Hoya notes the reply to these arguments. First, the United States is the strongest country in the free world, and it has a duty to protect "world security that goes beyond the responsibility of its COCOM allies." Second, because American technological capacity is uniquely advanced, an American embargo is tantamount to an East-West embargo.

⁹² *Export Administration Act: Agenda for Reform, Hearings Before the Subcomm. on Int'l Econ. Pol'y & Trade of the House Comm. on Int'l Rel.*, 95th Cong., 2d Sess. 16 (Oct. 4, 1978) (statement of George Bardos).

⁹³ *Id.* at 22 (statement of James Gray).

⁹⁴ This failure to synchronize review of the CCL with the review of the COCOM list may result in part from the fact that the Secretary of State is responsible for representing the United States position in COCOM, while the CCL is under the jurisdiction of the Secretary of Commerce. See *Export Licensing*, note 87 *supra*, at 7-9.

trol, thus permitting its sale.”⁹⁵ In order for an exception request to be granted, representatives of the member states of COCOM must unanimously approve the petition.⁹⁶

D. *Administration of Export Licensing under the Export Administration Act*

Applications for validated export licenses⁹⁷ are received by the Operations Division of the OEA, where they are examined first for completeness. If documents supporting the application are insufficient, the application will be returned to the exporter for clarification. The Compliance Division is occasionally requested to verify statements made in the application when officials suspect possible violation of the Export Administration Regulations.

If the application is complete and the exporter is not presently being penalized for previous violations of export regulations, the application is referred for technical screening to the appropriate product-oriented Licensing Division. There are four divisions to which the application may be channelled: (1) Computers, (2) Capital Goods and Production Materials, (3) Electronics and (4) Short Supply. If it is determined at this point that the item presents no threat to foreign policy or national security and that exportation will not create a short supply of the particular commodity, then the license may be approved without referral to another agency. Generally, licenses are issued at this phase in the decision-making process with respect to common items destined for free world countries. This step completes the process of obtaining a license for ninety percent of the applications filed with the OEA.⁹⁸

The remaining ten percent of applications are advanced another step to the Policy Planning Division (PPD). The PPD is divided into two branches. The Special Programs Branch is assigned applications covering items destined for free world countries which were not approved by the Licensing Division. The East-West Trade Branch handles applications for items going to communist countries. At this phase of the decision-making process the OEA has a measure of discretion.

⁹⁵ COMPTROLLER GENERAL, *supra* note 80, at 10.

⁹⁶ *Id.* at 15. Members may also obtain what is called an “administrative exception” for selected items by simply notifying the COCOM officials.

⁹⁷ It should be recalled that no formal approval is required for items included in regulations granting “general” export licenses. See notes 64 and 65 and accompanying text *supra*.

⁹⁸ See *Export Licensing*, note 87 *supra*, at 33.

Review by the Department of Defense is required under the EAA when the item is destined for "a country to which exports are restricted for national security purposes."⁹⁹ If it is determined that the item would make a significant contribution to the military potential of a country, and that this would be detrimental to the national security of the United States, the Department of Defense can exercise a statutory veto power to deny license approval.¹⁰⁰ If the commodity is not one which falls under the mandatory review of the Department of Defense under the EAA,¹⁰¹ then in some cases the PPD may itself determine whether a license should be approved on the basis of interagency guidelines.¹⁰²

If the PPD believes that interagency consultation is necessary, it may follow either of two possible avenues. First, it may refer the application informally by a "waiver memo" to the appropriate agencies directly concerned. If the PPD and the agencies consulted cannot agree on a disposition of the application the PPD must take a second route and refer the application to the Operating Committee (OC). In some cases the PPD may believe that formal consideration by the OC is warranted, and will refer the application to that body in the first instance.¹⁰³ Thus, there are two circumstances in which an application will be subjected to formal review by the Operating Committee: (1) when the PPD is unable to make a decision on the basis of established agency guidelines and, after referral, the agencies consulted cannot reach agreement, and (2) when the PPD believes that the application involves issues which are so fundamental or controversial that extensive consideration is required.

Once the machinery of the OC is called into play a formal process of multi-agency participation commences. This process may eventually involve five administrative levels: (1) the Operating Committee, (2) the sub-Advisory Committee for Export Policy (sub-ACEP), (3) the full Advisory Committee for Export Policy

⁹⁹ 50 U.S.C. app. § 2403(h) (Cum. Supp. 1978).

¹⁰⁰ See *id.* § 2403(h)(2), which requires the Secretary of Defense to determine, in consultation with the OEA, the types and categories of licenses which should be reviewed by Defense.

¹⁰¹ With specific items which would ordinarily be subject to review by the Department of Defense, Defense may delegate its power to review back to Commerce's OEA.

¹⁰² See McIntyre, *Interagency Decision Making Process* 9 (Cot. 1978) (unpublished paper on file at the Dean Rusk Center for International and Comparative Law, Athens, Georgia).

¹⁰³ McIntyre, *Accommodating Economic, Security and Political Interests in an Interagency Review Process? The Export Licensing Case 5 & 8* (Paper presented to the 40th Nat'l Cong. of the Am. Soc'y for Pub. Ad., Baltimore, Md., Apr. 1-4, 1979; on file at the Dean Rusk Center for International and Comparative Law, Athens, Georgia). Recent studies show that of the more than 60,000 applications for validated licenses received by the OEA in 1977, only 608 were submitted to the OC.

(ACEP), (4) the Export Administration Review Board (EARB) and (5) the President in conjunction with the National Security Council.

The OC functions at the senior staff level. It is chaired by the OEA's Assistant Director of Policy Planning, and meets weekly to discuss export policy in general as well as individual applications.¹⁰⁴ Senior staff from the Departments of Commerce, Defense, State, Energy, Treasury, the National Aeronautics and Space Administration, and the Central Intelligence Agency represent their respective agencies at these meetings. Because of the secrecy which surrounds OC proceedings there is some controversy concerning which of these members are entitled to vote. However, it is clear that the Departments of Commerce, Energy, State and Defense are voting members.

When it is determined that OC review is necessary, the PPD circulates copies of the application, supporting documents and other relevant information to the OC representatives, who review these materials within their individual agencies before the actual OC meeting. At the meeting, each official participant is requested to make a statement of opinion before the issues are discussed. If any disagreement cannot be resolved, disposition of the particular case may be deferred until a subsequent OC session. Eventually, reports are compiled from each agency and sometimes from outside consultants, and the application is submitted to the OC for a formal vote. The application can only be approved or denied by a unanimous vote, and therefore each voting department has a veto power.¹⁰⁵

Although in most instances the OC is able to resolve the case, where the application is stalled as a result of irreconcilable differences in policy, the application is forwarded to the sub-ACEP level.¹⁰⁶ The sub-ACEP body functions at the deputy assistant secretary level. It usually meets on a monthly basis¹⁰⁷ and follows essentially the same review procedures as the OC. Continuing disagreement may necessitate review by the ACEP, which is composed of assistant secretaries from the participating departments. In the event that the case cannot be resolved at that level, the case may require resolution by the Secretaries of Commerce,

¹⁰⁴ *Id.* at 8. The OC discusses approximately ten to fifteen applications at each meeting.

¹⁰⁵ *Extension of the Export Administration Act of 1969: Hearings Before House Comm. on Int'l Rel.*, 94th Cong., 2d Sess. 315-16 (1976) (statement of the Domestic and Int'l Bus. Ad [hereinafter 1976 Hearings]).

¹⁰⁶ McIntyre, *supra* note 102, at 10.

¹⁰⁷ *Id.*

Defense, State and Treasury sitting as the EARB. The application may ultimately be submitted for action by the National Security Council and the President.¹⁰⁸

It is apparent that this hierarchy for the implementation of the EAA can greatly extend the time required to obtain a validated license. The time involved will be a function of the characteristics of the commodity itself, the country of destination, and the number of agencies directly concerned with the license determination.

IV. IMPEDIMENTS TO EXPORTING IN THE LICENSING PROCESS

A. *Administration of the EAA*

The enactment of the EAA in 1969 was a response to requests from American exporters to strike a new balance between national economic interests and national security interests by loosening export controls. Instead of proposing operational standards to balance these interests, the Congress attempted to resolve this issue in the EAA by delegating broad discretion to the President and requiring executive agencies to consult and coordinate their policies when reviewing license applications. This broad delegation of power invites confusion and, coupled with the exclusion of the EAA from the Administrative Procedure Act, has resulted in an unnecessary infringement upon the right of citizens to engage in commerce.¹⁰⁹

There is a pressing need to clarify those foreign policies which may be the basis for export controls in order to avoid unpredictable administration. Congress should take steps to limit the discretion currently granted to the President by more clearly defining the priority of foreign policies relevant to the administration of export controls.

In addition, a balanced approach to export regulation requires that Congress state clearly the economic interests which are implicated by export controls, and the weight that must be assigned to such interests. Statutory commands alone, however, are insufficient to assure responsible administration of the law by the executive branch. If the Commerce Department and other involved agencies and departments are to be accountable for their actions, new procedures must be devised to open export regulation to con-

¹⁰⁸ *Export Licensing*, *supra* note 87, at 72.

¹⁰⁹ *Hearings Before the Subcomm. on Int'l Econ. Pol'y and Trade of the House Comm. on Int'l Rel.* 96th Cong., 1st Sess. 1, Mar. 14, 1979 (statement of F. Huszagh, G. Bertsch & J. McIntyre) [hereinafter 1979 *Hearings*].

gressional and public oversight. Secrecy should be the exception rather than the rule.

The combination of a broad delegation of authority to the President, exclusion of the EAA from the APA, and the undefined requirement of interagency coordination has led to frequent dissatisfaction by American exporters with inordinate time delays and lack of agency accountability in licensing review.¹¹⁰ In response, Congress amended the EAA in 1977¹¹¹ to require final disposition of license applications within ninety days unless it is determined that additional time is required. If this determination is made, the applicant must be given written notice of the reasons for delay and an opportunity to file a written response entitled to full consideration.¹¹² This rule has not effectively reduced delay due to the ambiguity of the authority of the OEA to determine that additional time is required for evaluation of the application.¹¹³ These delays continue to impair the ability of American exporters to compete successfully in the world market.¹¹⁴

In order to give greater coherence to export policy, regulatory powers should be centralized in a single department or agency. Centralization of authority would help reduce delays in the approval of applications. Centralization would also contribute to the fairness of the procedure for considering license applications by vesting the power of decision in a single body accountable to the Congress with respect to licensing policy.

In anticipation of the expiration of the President's authority under the Act in the Fall of 1979, both houses of Congress have considered amendments which would accompany a renewal of authority. Both the Senate bill, S. 737,¹¹⁵ and the House bill, H.R. 4034,¹¹⁶ would place greater emphasis on a trade expansion policy and the need to consider the economic effects of export controls. Only H.R. 4034, however, would substantially reform the procedures of export regulation.

Under H.R. 4034, the Secretary of Commerce would be required to provide for continuous review of controlled commodities, and to

¹¹⁰ *Id.* at 2.

¹¹¹ 50 U.S.C. app. § 2403(g) (Cum. Supp. 1978).

¹¹² *Id.* § 2403(g)(2).

¹¹³ McIntyre *supra* note 102, at 15. See also 1979 Hearings, note 109 *supra*, at 3 for statistical documentation of the gradual increase in the number of cases delayed for more than ninety days.

¹¹⁴ 1979 Hearings, *supra* note 109, at 3. See also Hearings Before the Subcomm. on Int'l Econ. Pol'y and Trade of the House Comm. on Foreign Aff., 96th Cong., 1st Sess. 2 (statement of F. Huszagh) [hereinafter April 2, 1979 Hearings].

¹¹⁵ S. 737, 96th Cong., 1st Sess. (1979).

¹¹⁶ H.R. 4034, 96th Cong., 1st Sess. (1979).

provide opportunity for comment by interested parties, similar to that provided under the Administrative Procedure Act. Although the power of the President to apply controls despite a finding of foreign availability would be retained, the President would be required to provide a published statement of the reasons for his action and the probable economic impact of the controls. The license application process would be expressly required to comport with basic standards of due process, and each exporter would be apprised of the specific basis for the denial of any license application.

S. 737 lacks these procedural reforms, but would restrain the use of foreign policy controls by incorporating a foreign availability test similar to that applied to national security controls. Also, it would require periodic reports to Congress by the President on the need for continued foreign policy controls. Neither H.R. 4034 nor S. 737 in their present form would cure the present delay and diffusion of authority in license processing.

B. *Export Administration Regulations.*

The Export Administration Regulations are by the nature of their function specific, technical and, in places, complex. Recently a "Plain English Project" was undertaken by the Department of Commerce to simplify and clarify the Regulations in order to make them more useful to exporters.

The single most heavily criticized portion of the Export Administration Regulations is probably the CCL.¹¹⁷ The competitive posture of American exporters is impaired because the government has been slow to re-evaluate the continuing need for validated licenses for specific items once they are placed on the list.¹¹⁸

C. *Dual Lists of Controlled Items: CCL and COCOM Lists*

Historically, the United States enjoyed a role of leadership over the policies of COCOM. This position was in part due to the fact that the United States was a leading producer of many strategic commodities, which created a degree of harmony between the COCOM control list and the CCL. Today, a number of COCOM members increasingly can supply strategic commodities, a number of which have not been added to the COCOM list although com-

¹¹⁷ 15 C.F.R. § 399.1 (1978). See text accompanying notes 72-80 *supra*.

¹¹⁸ See COMPTROLLER GENERAL, *supra* note 80, at 20-21 which reports that while Congress instructed that all items on the CCL be reviewed by Dec. 31, 1978 to determine if restrictions were still warranted, little progress has yet been made. See also 1979 *Hearings*, note 109 *supra*, at 10.

parable items are controlled by the CCL. American exporters of goods subject to validated licenses under the CCL but not on the COCOM list suffer competitive disadvantage.¹¹⁹

New export legislation should require an immediate review of the need for validated licenses with respect to controlled items not presently on COCOM list. It may be generally presumed that such items are freely available on foreign markets and continuation of these items on the CCL should now be justified before Congress.

A review of the items presently on the CCL will not diminish the leadership role of the United States in controlling strategic goods through COCOM. Rather, the competitive need for uniformity of the CCL and the COCOM list underscores the need for the U.S. to encourage other COCOM members to jointly determine which items must be controlled as a means of mutual economic and military security.

V. PROCEDURAL RIGHTS OF EXPORTERS

The existing procedures followed by government agencies responsible for the enforcement of the Export Administration Act have provided exporters with only an abbreviated form of the process. The major reason that procedural rights now regarded as fundamental in most forms of government regulation are denied to exporters is because strategic export regulation under the EAA is exempt from the requirements of the Administrative Procedure Act (APA).¹²⁰ During the Congressional proceedings leading to the enactment of the Export Control Act of 1949,¹²¹ extension of the APA to export regulation was discussed but rejected because export controls were then regarded as a temporary measure.¹²² Though export regulation has now become a fixture in United States foreign trade law, basic procedural rights have not yet been introduced under the Act.

Principal arguments raised by defenders of the limited input and secrecy of the existing licensing process are, first, that national security would be jeopardized by a more open and cumbersome procedure, and second, that export licensing requires policy decisions for which hearings on individual applications are inappropriate.¹²³ Even the APA shows special deference to national

¹¹⁹ *Export Licensing*, *supra* note 87, at 35. See also *April 3, 1979 Hearings*, note 114 *supra*, at 2.

¹²⁰ 50 U.S.C. § 2407 (Cum. Supp. 1978).

¹²¹ See text at note 1 *supra*.

¹²² Berma & Garson, *supra* note 3, at 797-98.

¹²³ See 1976 *Hearings* note 105 *supra* (statement of A. Downey).

security matters by exempting from APA procedures all government actions involving "the conduct of military or foreign affairs functions."¹²⁴ The unqualified exemption of foreign and military affairs functions from the APA has not gone unchallenged. Many commentators have questioned whether national security or foreign policy is always at stake when an agency decision implicates foreign or military affairs, and have argued that procedural safeguards should be sacrificed only when the threat to security is real and significant.¹²⁵

Decisions made under the Export Administration Act often require a consideration of foreign policy, yet an individualized hearing would be inappropriate to determine the relative importance of foreign policy issues raised by an application. To the extent that license denial is based on findings concerning alternative foreign availability or the military adaptability of a product, however, the critical question is one of fact rather than foreign policy. If reasonable protection of sensitive government information is provided for, a full hearing on questions of fact in disputed applications would not disrupt the policy-making level of the export regulations process. Both the APA and judicial principles of due process are sufficiently flexible standards to allow effective individual input into the license application process, instead of denying a fair hearing in every instance.

Due process requires that persons threatened with a denial of life, liberty or property by government action be afforded an opportunity to know the arguments and evidence opposing their interests, and to make a defense of those interests through counterarguments or cross-examination.¹²⁶ The APA guarantees these rights to parties affected by a federal agency in an adjudicative action.¹²⁷ Export licensing proceedings, however, are conducted in the absence of the applicant, and the matters considered and the reasoning of the administering agencies is not

¹²⁴ 5 U.S.C. § 554(a)(4) (1976).

¹²⁵ See generally Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 MICH. L. REV. 222 (1971); Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in Economic Regulation*, 17 AD. L. REV. 159 (1965).

For a more detailed due process analysis of export regulatory procedures, Note, *Accountability and the Foreign Commerce Power: A Case Study of the Regulation of Exports*, 9 GA. J. INT'L. & COMP. L., Issue No. 3 (1979).

¹²⁶ See generally L. TRIBE, *AMERICA CONSTITUTIONAL LAW* 474-563 (1978).

¹²⁷ 5 U.S.C. §§ 554(b)-(d), 556, 557 (1976). An adjudication, as distinguished from a rulemaking action, is a proceeding which determines the legal consequences of past events. *Id.* §§ 551(6), (7). This definition would not include the licensing function of the OEA, which has only prospective effect, but for the special provision that licensing decisions shall be regarded as adjudications. *Id.* § 551(6), (9).

open to public or judicial scrutiny.¹²⁸ The OEA has attempted to provide applicants with summaries of arguments raised by other agencies, so that the applicants will be able to make some response.¹²⁹ Unfortunately, this form of communication between government and exporter has failed to achieve the advantages of a face to face hearing. Because of the diffusion of authority under the Act, the OEA has found it difficult to present applicants with a complete exposition of the reasoning behind challenges raised by other agencies.¹³⁰ A break-down in communications is increasingly likely as agencies more remote from the export industry assume decision-making authority under the Act.¹³¹

Effective participation by exporters in licensing determinations would rebuild the confidence of American exporters in this process, and would enhance the reliability of licensing decisions by encouraging the submission of evidence by the party best acquainted with the transaction under consideration. Where secrecy is needed for reasons of national security, nondisclosure of government information and *ex parte* proceedings could be considered as the exception rather than the rule.

The judiciary has been reluctant to invalidate the existing export regulation procedures because licensing decisions may involve highly sensitive questions of policy or national security as well as nonsensitive issues of fact.¹³² Congressional action is therefore required to create a licensing procedure which will strike an open balance between due process and national security.

VI. CONCLUSION

The shift in the political and economic circumstances of United States trade during the last thirty years calls for a more balanced approach to the regulation of exports. Foreign trade is vital to the

¹²⁸ See *Daedalus Enterprises, Inc. v. Kreps*, No. 78-893 (D.D.C. May 18, 1978) reprinted in U.S. EXPORT WEEKLY, May 30, 1978, at I-5, *aff'd* No. 78-1442 (D.C. Cir. May 25, 1978). The trial court in *Daedalus* held that licensing decisions of the Department of Commerce involved questions of national security committed to the Executive Branch, and were therefore immune from judicial review.

¹²⁹ 15 C.F.R. § 370.11 (1978).

¹³⁰ 1978 COMPTROLLER GENERAL REPORT, *supra* note 57, at 9-10. In its complaint in *Daedalus Enterprises, Inc. v. Kreps*, discussion *supra* note 128, *Daedalus* asserted several instances of misinformation by the Commerce Department. U.S. EXPORT WEEKLY, May 30, 1978, at 0-3. See also the problems encountered by Cyril Bath Co. reported in U.S. EXPORT WEEKLY, June 13, 1978, at A-3.

¹³¹ See *Export Administration Act: Agenda for Reform: Hearings Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Int'l Relations*, 95th Cong., 2d Sess. 29 (1978) (statement of J. Gray).

¹³² See note 128 *supra*.

national interest, competing in importance to the need to control sales of strategic exports. A regulatory system structured to subordinate economic welfare to foreign policy in every instance risks betrayal of the national interest by failing to consider whether the cost of trade restrictions is worth the expected gain in security.

Existing legislation should be amended to allow more informed participation by license applicants by requiring a full explanation of the issues raised by the application, opportunity for reply by the exporter, and an explanation of the specific factual basis of the denial of any application. Enactment of H.R. 4034 would be a positive step toward injecting fairness and accountability into the export regulation process. If combined with the stronger restrictions of S. 737 concerning foreign policy controls, H.R. 4034 would begin the needed reorientation of United States export control policy.

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